

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

6

DECISION

TOPIC **Notice of Intended Action: Chapter 23, Air Quality Program Rules –
Rescission of vacated NESHAPS**

The Department is requesting permission from the Commission to proceed with the rulemaking process and publish a Notice of Intended Action to amend Chapter 23 "Emission Standards for Contaminants" of the 567 Iowa Administrative Code.

This rulemaking was presented to the Commission for information in October. At the request of the Commission, the Department removed from the Notice the amendments related to the Clean Air Interstate Rule (CAIR) and Clean Air Mercury Rule (CAMR), and will instead present more information on these programs at a future Commission meeting. No other significant changes were made to the Notice from what was presented to the Commission in October.

The purpose of the proposed rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT) and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

Over the last year and a half, the D.C. Court has issued rulings on several significant federal programs promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air agencies.

In response to these vacatur, the Department is proposing to remove the now vacated federal regulations that were adopted by reference. The specific rule amendments being proposed are explained in the preamble of the attached Notice. A summary of the vacated federal regulations, the D.C. Court decisions, and the impacts of the vacatur on the Department and on stakeholders is included below and in the Notice preamble.

MACT Regulations

Section 112 of the Clean Air Act (CAA), as amended in 1990, requires EPA to develop a list of source categories or subcategories that emit, or have the potential to emit, Hazardous Air Pollutants (HAP), and to issue regulations for these source categories or subcategories. Section 112 also requires certain subject sources to meet Maximum Achievable Control Technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the National Emissions Standards for Hazardous Air Pollutants (NESHAP) program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT are adopted by reference into the state air quality rules.

CAA Sections 112(g) and 112(j)

Section 112 of the CAA includes provisions to require MACT for major sources of HAP emissions in the event that EPA does not issue MACT standards. Under section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the unit will meet standards equivalent to MACT. Under section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both 112(g) and 112(j) in Iowa.

MACT Vacatur

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf>

The D.C. Court issued its decision to vacate the Boiler MACT on June 8, 2007, and issued the mandate making the decision final and effective on July 30, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf>

Because of the D.C. Court vacatur, it now appears that sections 112(g) and 112(j) apply to sources affected by the now vacated Boiler and Brick MACTs. Additionally, EPA has informally stated that it plans to re-propose a Boiler MACT by July 31, 2009, and plans to re-promulgate a final Boiler MACT standard by July 31, 2010. EPA has not provided a schedule for re-promulgating the Brick MACT.

Department Activities

At the Department's Air Quality Client Contact meeting on August 14, 2008, the Department discussed the implications of the Boiler MACT vacatur with stakeholders. At the meeting, the Department outlined a tentative, section 112(j) timeline for owners and operators of facilities with boilers and process heaters. The Department sent letters to affected facilities outlining the Department's plans on September 16, 2008.

The Department plans to form an implementation workgroup in late winter or early spring of 2009 to determine whether the Department must develop section 112(j) requirements for boilers and process heaters, and, if so, when to begin developing those standards. Proposed rule changes to implement section 112(j) may be initiated as a result of the workgroup activities. If EPA fails to re-promulgate final MACT standards for boilers-process heaters by the applicable deadlines, the Department may be required to finalize the state's 112(j) MACT standards prior to EPA's re-promulgation.

Since only three brick and structural clay products manufacturing facilities exist in the state, the Department will be working with these facilities individually to develop the 112(j) requirements, as needed.

During the rulemaking process to remove the vacated federal regulations from state air quality rules, the Department will continue to closely monitor EPA and federal court actions, and, if needed, will alter its proposed rulemaking and implementation strategies.

If the Commission approves this Notice of Intended Action, a public hearing will be held on Monday, January 5, 2009, at 1 p.m. at the Department's Air Quality Bureau offices. The public comment period for the proposed rules will close on Tuesday, January 6, 2009.

An administrative rule fiscal impact statement is attached.

Christine Paulson
Environmental Specialist Senior
Program Development Section, Air Quality Bureau
Memo date: October 20, 2008

ENVIRONMENTAL PROTECTION COMMISSION [567]

Notice of Intended Action

Pursuant to the authority of Iowa Code section 455B.133, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 23, “Emission Standards for Contaminants,” of the Iowa Administrative Code.

The purpose of the proposed rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers and process heaters and the NESHAP for brick and structural clay products manufacturing.

Over the last year and a half, the D.C. Court has issued rulings on several significant federal programs promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. Although the D.C. Court vacated the federal regulations, the regulations were adopted by reference and therefore are still in effect and enforceable by the Department. The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air agencies. In response to these vacatur, the Department is proposing to remove the now vacated federal regulations that were adopted by reference.

Section 112 of the Clean Air Act (CAA), as amended in 1990, requires EPA to develop a list of source categories or subcategories that emit, or have the potential to emit, Hazardous Air Pollutants (HAP), and to issue regulations for these source categories or subcategories. Section

112 also requires certain subject sources to meet Maximum Achievable Control Technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the National Emissions Standards for Hazardous Air Pollutants (NESHAP) program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT are adopted by reference into the state air quality rules.

Section 112 of the CAA includes provisions to require MACT for major sources of HAP emissions in the event that EPA does not issue MACT standards. Under section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the unit will meet standards equivalent to MACT. Under section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both 112(g) and 112(j) in Iowa.

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf>

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Because of the D.C. Court vacatur, it now appears that sections 112(g) and 112(j) apply to sources affected by the now vacated Boiler and Brick MACTs. Additionally, EPA has informally stated that it plans to re-propose a Boiler MACT by July 31, 2009, and plans to re-promulgate a final Boiler MACT standard by July 31, 2010.

At the Department's Air Quality Client Contact meeting on August 14, 2008, the Department discussed the implications of the Boiler MACT vacatur with stakeholders. At the meeting, the Department outlined a tentative, section 112(j) timeline for owners and operators of facilities with boilers and process heaters. The Department sent letters outlining the Department's plans to affected facilities on September 16, 2008.

Since only three brick and structural clay products manufacturing facilities exist in the state, the Department will be working with these facilities individually to develop the 112(j) requirements, as needed.

During the rulemaking process to remove the vacated federal regulations from state air quality rules, the Department will continue to closely monitor EPA and federal court actions, and, if needed, will alter its proposed rulemaking and implementation strategies.

Item 1 amends paragraph 23.1(4)"dd," which adopts by reference the federal provisions for the Boiler MACT. The amendment removes most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Boiler MACT. The

amendment also includes a footnote explaining the vacatur and indicating that the federal regulations under Subpart DDDDD are no longer adopted by reference. The paragraph is being preserved as a placeholder because EPA is required to re-promulgate the Boiler MACT, and may do so under the same federal subpart.

Item 2 amends paragraph 23.1(4)“dj,” which adopts by reference the federal provisions for the Brick MACT. The amendment removes of most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Brick MACT. The amendment also includes a footnote explaining the vacatur and indicating that the federal regulations under Subpart JJJJJ are no longer adopted by reference. The paragraph is being preserved as a placeholder because EPA is required to re-promulgate the Brick MACT, and may do so under the same federal subpart.

Any person may make written suggestions or comments on the proposed amendments on or before January 6, 2009. Written comments should be directed to Christine Paulson, Department of Natural Resources, Air Quality Bureau, 7900 Hickman Road, Suite 1, Urbandale, Iowa 50322, fax (515)242–5094, or by electronic mail to christine.paulson@dnr.iowa.gov.

A public hearing will be held on January 5, 2009, at 1 p.m. in the conference rooms at the Department’s Air Quality Bureau office located at 7900 Hickman Road, Urbandale, Iowa. At the public hearing, comments on the proposed amendments may be submitted orally or in writing. All comments must be received no later than Tuesday, January 6, 2009.

Any person who intends to attend the public hearing and has special requirements, such as those related to hearing or mobility impairments, should contact Christine Paulson at (515)242–5154 to advise of any specific needs.

These amendments are intended to implement Iowa Code section 455B.133.

The following amendments are proposed.

ITEM 1. Amend paragraph 23.1(4)“dd” as follows:

dd. Emission standards for industrial, commercial and institutional boilers and process heaters. These standards apply to new and existing major sources with industrial, commercial or institutional boilers and process heaters. ~~For purposes of these standards, a boiler is defined as an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Waste heat boilers, as defined in the federal rule, are excluded from these standards. For purposes of these standards, a process heater is defined as an enclosed device using controlled flame, that is not a boiler, and the unit’s primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. Process heaters do not include units used for comfort or space heat, food preparation for on-site consumption, or autoclaves.~~ (Part 63, Subpart DDDDD)*

*As of [insert effective date of rule], Part 63, Subpart DDDDD, is not adopted by reference. On July 30, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart DDDDD, in its entirety, and required EPA to re-promulgate final standards for industrial, commercial or institutional boilers and process heaters at new and existing major sources.

ITEM 2. Amend paragraph 23.1(4)“dj” as follows:

dj. Emission standards for hazardous air pollutants for brick and structural clay products manufacturing. These standards apply to new and existing brick and structural clay products manufacturing facilities that are, are located at, or are part of a major source of hazardous air pollutant emissions. ~~The brick and structural clay products manufacturing source category includes those facilities that manufacture brick including, but not limited to, face brick, structural brick, and brick pavers; clay pipe; roof tile; extruded floor and wall tile; or other extruded, dimensional clay products. Additional applicability criteria and exemptions from these standards are contained in the applicable subpart. (Part 63, Subpart JJJJ)**~~

**As of [insert effective date of rule], Part 63, Subpart JJJJ, is not adopted by reference. On June 18, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart JJJJ, in its entirety, and required EPA to re-promulgate final standards for brick and structural clay products manufacturing at new and existing major sources.

Date

Richard A. Leopold, Director

Administrative Rule Fiscal Impact Statement

Date: October 20, 2008

Agency: Department of Natural Resources

IAC Citation: 567 IAC. 23.1(4)"dd" and 23.1(4)"dj"

Agency Contact: Christine Paulson

Summary of the Rule: The purpose of the proposed rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT) and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

Fill in this box if the impact meets these criteria:

☒ No Fiscal Impact to the State.

☐ Fiscal Impact of less than \$100,000 annually or \$500,000 over 5 years.

☐ Fiscal Impact cannot be determined.

Brief Explanation:

Rule changes will not affect expenditures or revenues to the state.

Fill in the form below if the impact does not fit the criteria above:

☐ Fiscal Impact of \$100,000 annually or \$500,000 over 5 years.

* Fill in the rest of the Fiscal Impact Statement form.

Assumptions:

Describe how estimates were derived:

Estimated Impact to the State by Fiscal Year

	<u>Year 1 (FY)</u>	<u>Year 2 (FY)</u>
Revenue by Each Source:		
GENERAL FUND		
FEDERAL FUNDS		
Other (specify)		
TOTAL REVENUE	_____	_____
Expenditures:		
GENERAL FUND		
FEDERAL FUNDS		
Other (specify)		
TOTAL EXPENDITURES	_____	_____
NET IMPACT		

 x This rule is required by State law or Federal mandate.

Please identify the state or federal law:

Clean Air Act sections 112, as codified in 40 Code of Federal Regulations, Part 63

 Funding has been provided for the rule change.

Please identify the amount provided and the funding source:

 x Funding has not been provided for the rule.

Please explain how the agency will pay for the rule change:

The agency will not need additional revenue to implement this rule.

Fiscal impact to persons affected by the rule:

The vacatures of these federal programs have elicited uncertainty and confusion for regulated industries. Since the now-vacated federal regulations were adopted by reference into state rules, the affected facilities needed to apply for variances from recordkeeping and reporting provisions contained in the federal regulations that were adopted by reference. Removing the federal regulations that were adopted by reference will be a benefit to industries and other facilities affected by the Boiler MACT and Brick MACT because they will no longer need to apply for variances. The Department is working directly with affected facilities on what future state or federal rules may require.

Fiscal impact to Counties or other Local Governments (required by Iowa Code 25B.6):

A few municipal utilities were impacted by the now-vacated Boiler MACT. As noted above, removing the federal regulations that were adopted by reference will be a benefit to these facilities because they will no longer need to apply for variances. The Department is working directly with affected facilities on what future state or federal rules may require.

* If additional explanation is needed, please attach extra pages.

Agency Representative preparing estimate: Christine Paulson
Telephone Number: 515 242-5154